

No. 45442-4-II

**DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON**

WAL-MART STORES, INC.,

Plaintiff-Appellant,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL
UNION; ORGANIZATION UNITED FOR RESPECT AT WALMART;
and DOES I-X,

Defendants-Respondents.

ON APPEAL FROM
PIERCE COUNTY SUPERIOR COURT
(Hon. Jack Nevin)

**APPELLANT WAL-MART STORES, INC.'S
REPLY BRIEF**

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I. INTRODUCTION

Sears is virtually on all fours with this case. Both involve trespassory picketing even though the union's picketing might also have violated the National Labor Relations Act ("NLRA"). Neither involved violence. And there was no claim that the picketing was protected under the NLRA. The result here should be the same as in *Sears*.

Defendants' contrary arguments are futile. It does not matter that the facts and evidence of this case overlap with those alleged in Walmart's prior (and withdrawn) ULP charge: the *legal* controversies are different.

The purpose of Walmart's ULP charge was to protect its associates' freedom of choice in supporting or rejecting the union; the charge did not allege that the trespasses themselves violated the NLRA. Indeed, Walmart would have filed the same charge had Defendants' bullying occurred at associates' homes. In contrast, a Washington court does not in any way evaluate *associate* rights under *federal* labor law. A Washington court evaluates only the rights of the property owner/leaseholder under *state* law, which is a matter "deeply rooted" in local interest and responsibility. Violence is not a pre-requisite.

Moreover, the National Labor Relations Board ("NLRB") has no jurisdiction to issue an injunction against garden variety trespass. Any injunction entered as part of a NLRB proceeding could stop *only* the coercive conduct directed at employees (regardless of whether it happened on or off property), *not* trespassing in and of itself. Indeed, the NLRB has rejected NLRA employee-coercion charges even when there was

trespassing. Among all the (irrelevant) NLRB cases that Defendants cite, not one of them involved an employer filing a “stop trespassing” ULP charge against a union and the NLRB issuing a “stop trespassing” order. Whatever relief the NLRB can provide, it does not preclude this lawsuit.

When reduced to its essential core, Defendants ask this Court to write into Washington trespass law an exception for any union activity conducted in the presence of employees on an employer’s private property. According to Defendants, because the NLRA might arguably prohibit trespassory attempts to persuade employees to support the union, Washington property protections become a nullity. But what case so holds? None. Not one. To the contrary, the U.S. Supreme Court has repeatedly held that the NLRA does not preempt state law claims (like trespass) that do not involve the same legal controversy as a NLRA charge, even if based on the same factual scenario. And state courts in California, Maryland, Arkansas, Colorado, Florida, and Texas (both trial and appellate levels) have rejected the Defendants’ same arguments.

Finally, Defendants’ SLAPP motion presents no dispute as to the material facts: they admit they enter private property, engage in mass demonstrations (including “peaceful” picketing, manager confrontations, and handbilling, as they say) and refuse to leave when Walmart requests. Whether or not Defendants have a First Amendment or other privilege to do what they do (they don’t) is a legal issue subject to de novo review. Walmart should not have to suffer further delay in obtaining needed relief.

II. ARGUMENT

A. Defendants Distort Both *Sears*' Holding And Walmart's Claims Before The NLRB And The Trial Court.

Defendants are at it again. In the other trespass cases, their method of operation is to try to confuse courts by mixing and matching the *Sears* “arguably prohibited” and “arguably protected” analyses. Those two prongs of preemption are separate and distinct; as the Court made clear, they “differ in significant respects and therefore it is useful to review them separately.” *Sears, Roebuck & Co.*, 436 U.S. 180, 190 (1978).

Conflating the two prongs didn't work for Defendants in the other states: under the “arguably prohibited” prong—the only prong at issue in this case—an employer's filing of a ULP charge is irrelevant where, as here, the legal controversies are different. ***This is so even though the NLRA arguably prohibits aspects of the challenged conduct, and even if the NLRB investigates and issues a complaint.*** In other words, states remain free to regulate matters deeply rooted in local interest, and trespass is one such matter. Case after case has said that.

On the other hand, “[t]he question whether the arguably *protected* character of [Defendants'] trespass[es] provides a sufficient justification for pre-emption of the state court's jurisdiction over [this] trespass claim involves somewhat different considerations.” *Id.* at 199-200 (emphasis added) (“Considerations of federal supremacy ... are implicated to a greater extent when labor-related activity is protected than when it is prohibited.”). Still, *Sears* rejected preemption under the “arguably protected” prong because *Sears* had no other forum in which to resolve

whether the union's picketing was protected under the NLRA. *Id.* The union there, *like Defendants here*, had not filed a ULP charge alleging it was wrongfully evicted from Sears' property. The lack of an audience with the NLRB was a factor in rejecting "arguably protected" preemption, *not* "arguably prohibited" preemption. Thus, Walmart's efforts to obtain a ruling on whether Defendants' demonstrations were *prohibited* under the NLRA (because they coerced associates in exercise of their right to choose or reject a union) does not distinguish *Sears*. The trial court failed to recognize this distinction between the two prongs of *Sears* preemption.

1. Walmart's trespass claim is separate and distinct from the associate coercion charge it filed with the NLRB.

Like the lawsuit in *Sears*, Walmart's First Amended Complaint ("FAC") sought relief only as to the location of Defendants' demonstrations. 436 U.S. at 185 ("Sears asserted no claim that the picketing itself violated any state or federal law. It sought simply to remove the pickets from its property to the public walkways...."). In other words, "as a matter of state law, the location of the picketing was illegal but the picketing itself was unobjectionable." *Id.*

The injunction Walmart seeks would prohibit Defendants and their supporters from coming *onto* its private property to engage in non-shopping conduct. CP 61. The injunction sought does not seek to restrict Defendants' media postings. It does not seek to restrict what their banners and signs say. Nor does it seek to restrict who can join their campaign. Defendants are free to recruit whomever they want to parade around, bang

on various props, carry signs, and blow horns *on public property*, so long as they don't block access or otherwise break the law. Indeed, Defendants have done their thing on public property before (without blocking traffic), and in those instances, Walmart has done nothing to stop them.

a. Walmart's ULP and trespass action involve different legal controversies.

Walmart's claims herein are about employer property rights (under state trespass law), while its (withdrawn) NLRB case was about associate freedom of choice (under federal labor law). Those are different controversies, and adjudication of one does not interfere with adjudication of the other. *Sears*, 436 U.S. at 197 ("The critical inquiry ... is ... whether the controversy presented to the state court is *identical* to [] or different from ... that which could have been, but was not, presented to the Labor Board." (emphasis added)); *see also Hotel Emps. & Rest. Emps., Local 8 v. Jensen*, 51 Wn. App. 676, 679, 754 P.2d 1277, 1280 (1988) ("The critical determination ... is whether a state ... claim involves an identical controversy to that which could have been brought before the NLRB.").

Walmart's ULP charge alleged that *some* aspects of some of the demonstrations violated NLRA 8(b)(1)(A) by trying to intimidate and bully associates into supporting the UFCW. CP 128, 240-43. In particular, the charge alleged that Defendants orchestrated "a series of unauthorized and blatantly trespassory in-store mass demonstrations ... and other confrontational group activities," by which they "*restrained and coerced employees in the exercise of their Section 7 rights ...* by

attempting to impose its will on ... management in front of facility employees through the sheer force of a mass of moving bodies.” CP 243 (emphasis added). Walmart made no allegations regarding non-blocking sidewalk or parking lot activity, no allegations about non-bullying interior activity, and no allegations about its property rights under state law. *Id.*

In other words, as required under the NLRA, Walmart’s ULP charge focused on the effect of Defendants’ conduct *on its associates*, regardless of whether there was a trespass under state law. *See, e.g. Millwrights & Machinery Erectors Union Local 102*, 317 NLRB 1099, 1102 (1995) (essential element of coercion charge is that union member’s conduct “must be shown to have affected ‘employees’”); *Nat’l Health & Human Serv. Emps. Union*, 339 NLRB 1059 (2003) (union organizer, who was *invited* onto employer’s property, unlawfully coerced employees through a series of intimidating acts). Where the coercion occurs is not an element of a NLRA 8(b)(1)(A) charge; in contrast, the location of the conduct described in Walmart’s FAC is essential to obtain relief in this trespass action—the conduct must occur on Walmart’s private property.

Indeed, the Board has rejected NLRA 8(b)(1)(A) charges even when the union trespassed. In *Retail Store Employees Local 1001*, 203 NLRB 580 (1973), several union agents came on the employer’s private property and solicited employees to sign union authorization cards. After refusing to leave, they argued for an hour with the police, whom the employer had called to remove the trespassers. The NLRB found no violation of NLRA 8(b)(1)(A) because the agents’ conduct “did not result

in the imposition of the [union's] will over the Company and its premises so as to constitute restraint and coercion of the employees.” *Id.* at 581. Significantly, the NLRB concluded that whether or not their conduct constituted “a trespass is a matter *for the state and local authorities* and we make no comment thereon.” *Id.* (emphasis added); *see also Metro. Reg'l Counsel of Carpenters*, 358 NLRB No. 39, at *4 (2012) (trespassing union agent interrogated employees; “[a]lthough the Union’s conduct may violate trespassing ... laws, I conclude that it does not violate the Act”).

As one Board member put it when deciding an 8(b)(1)(A) charge:

While I do not condone [the union agent]’s behavior—it may well have [been] trespass under state law, and it almost certainly was not protected by the Act—I see no basis for finding a violation here.... The record simply does not establish the required ‘unmistakable nexus’ between [the] conduct and the Section 7 rights of employees, *the only legal interests that § 8(b)(1)(A) is concerned with.*

Nat’l Health & Human Serv. Emps. Union, 339 NLRB 1059, 1063 (2003) (emphasis added). Walmart’s ULP charge involved different legal issues.

b. The factual overlap is irrelevant.

Defendants continue to harp on their “comparison” of the events described in Walmart’s ULP charge and its FAC, Answering Brief (“AB”) 5, 15, 24-27, claiming that the overlap means the NLRB should adjudicate Walmart’s trespass claim. Defendants simply don’t get it.

“Although the analysis of a state law claim may involve attention to the same factual considerations as a charge before the [NLRB], such

parallelism does not require *Garmon* preemption.” *Zavadil v. Alcoa Extrusions, Inc.*, 437 F. Supp.2d 1068, 1075 (D.S.D. 2006) (state law breach of contract claim “does not require any showing that Plaintiff’s termination was in any way intended to interfere with, restrain or coerce non-supervisory employees in the exercise of their organizational rights”); see *Milne Emps. Ass’n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1417 (9th Cir. 1992) (“despite the commonality of some underlying facts, allowing the employees to pursue their state law claims will not interfere with the Board’s determination of matters within its scope of expertise”). Thus, “when a union’s picketing activities trespass on an employer’s property, the employer ordinarily may maintain a trespass action ...even though the union’s picketing was arguably prohibited or protected by federal law.” *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 784 (9th Cir. 2001) (malicious prosecution claim arising out of trespass arrest not preempted).¹

Walmart did not allege that Defendants trespassed “because of the manner they conducted their events.” AB 13 n.5. They trespassed because their conduct exceeded the limited invitation that Walmart extends to the public to shop at its stores. See, e.g., *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 651, 989 P.2d 524 (1999)

¹ E.g., *Sears*, 436 U.S. at 196-97 (“[a]lthough the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same”); *Automobile Workers v. Russell*, 356 U.S. 634, 637, 645 & n.2 (1958) (no preemption in state obstruction of access case “even though [] complaint charged a violation of [the NLRA]” and even though Court “assume[d]...that that the union’s conduct did violate [the Act]”).

(upholding injunction prohibiting petitioners from entering retailer’s stores and parking lots; “property [does not] lose its private character merely because the public is generally invited to use it for designated purposes”).

Thus, Walmart describes what goes on during demonstrations to distinguish Defendants’ conduct from that of the shopper-invitee who is allowed to use Walmart’s property (and to establish irreparable harm, Opening Brief (“OB”) 21). CR 57 (“Walmart clearly communicated to Defendants that it confers a business invitation to the public to shop and make purchases on its property, but that invitation does not extend to the Defendants’ conduct [during demonstrations].”). To conclude that individuals lost their invitee status and trespassed, a court has to know the nature of their conduct. Wash. Pattern Jury Instructions 120.05 cmt. (“A visitor’s status as a business invitee may be lost if the invitee exceeds the scope of the invitation or ventures beyond the area of invitation.” (quotations omitted)). In fact, Walmart could have brought the same lawsuit if Defendants instead used its parking lots as soccer fields.

c. Courts addressing the same issue have rejected Defendants’ arguments.

Defendants misrepresent that none of the rulings in Walmart’s other trespass lawsuits against them have found that its ULP charge and trespass claims involved different controversies. AB 17 n.6.² In California, the court concluded that “[s]imilar to the facts in *Sears*,

² Defendants “encourage this Court to closely read all of those decisions.” AB 4 n.2.

[Walmart] has only challenged the location of the picketing and in-store [sic] demonstrations.” Walmart’s Req. for Judicial Not. (granted on 6/25/14), 10/23/13 Cal. Order 6 (quotations & alterations omitted). Thus, “whether Defendants coerced [Walmart]’s employees [in violation of the NLRA] would turn on complex factual questions separate from whether the in-store demonstrations constituted a trespass.” *Id.*

Likewise, the Colorado court concluded that in Walmart’s ULP, “the question is whether [Defendants] restrained or coerced employees,” whereas in the state law trespass action, “the question is whether the[y] may conduct unwanted activity in and around Walmart stores.” *Id.*, 3/11/14 Colo. Order 4. The latter “is a property rights issue that has traditionally been a concern of state law.” *Id.* And in Florida, the court pointed out that “[a]ny legal controversy that might have been presented to the [NLRB] by the parties to this action, while they might arise out of the same facts, is or would be *radically different* from the present action.” *Id.*, 11/21/13 Fla. Order 2 (emphasis added). The same is true here.

d. Defendants’ cases are inapposite.

The trial court’s reliance on *Local 926, Int’l Union v. Jones*, 460 U.S. 669 (1983), was misplaced. Unlike a trespass claim, the contract interference claim against the union in *Local 926* shared a “crucial element” with the alleged NLRA violation—in both, the supervisor’s discharge “must be shown to be the result of [u]nion influence.” *Id.* at

682.³ And the NLRB had already found that the union was not at fault for the discharge. *Id.* at 683 (“Jones sought to *relitigate* the question in the state courts. The risk of interference with the Board’s jurisdiction is thus obvious and substantial.” (emphasis added)).

Here, whatever the NLRB decided (Walmart withdrew its ULP charge because of the NLRB’s delay in taking action),⁴ it would not have resolved whether Defendants had a state law right to come onto Walmart’s private property in the first place. *Id.* at 682-83 (noting that in *Sears*, the ULP “would have focused on ... issues completely unrelated to the simple question whether a trespass had occurred.” (quotations omitted)).

Defendants also rely on *Hillhaven Oakland Nursing & Rehabilitation Center v. Healthcare Workers*, 41 Cal.App.4th 846 (1996), but as Walmart already explained, OB 24, that case involved unique facts not present here: there was a collective bargaining agreement and a subsequent settlement with the NLRB which gave the union access to its property. Most tellingly, a *California* court already rejected the idea that

³ Both before the NLRB and in state court, the supervisor’s right to continued employment was at stake. Thus, contrary to Defendants’ arguments, AB 12-14, *Jones* is not like this case, where Walmart associates’ NLRA rights to be free from coercion were at stake only in the ULP proceeding (and *not* this state law trespass action).

⁴ Walmart amended its charge to focus on coercion associated with a bomb threat and internet bribes to buy associates’ support. The NLRB, however, concluded that Defendants’ agent’s bomb threat did not violate the NLRA because the threatened associate (according to the NLRB) was a supervisor and that the bribes were just offers of “strike benefits.” www.nlr.gov/cases-decisions/advice-memos (16-CB-099612, 11/15/13).

Hillhaven (a California decision) applied in the context of this case. Walmart's Req. for Judicial Not., 10/23/13 Cal. Order 7.

Finally, *Pennsylvania Nurses Ass'n v. Pennsylvania State Education Ass'n*, 90 F.3d 797 (3d Cir. 1996) (AB 14), merely confirmed the validity of the “deeply rooted” exception to arguably prohibited preemption. *Id.* at 805. Trespass laws and protecting property rights are deeply rooted local interests, *infra* at 20-22; the claims in *Pennsylvania Nurses* were not. 90 F.3d at 805. Nor was the claim in *Jones*. 460 U.S. at 683 (“They also foreclose any claim that Jones’ action ... for interference with his job is so deeply rooted in local law....”).

2. *Sears* does not prohibit an employer from proceeding before the NLRB and in state court.

Defendants argue that because Walmart filed a ULP charge, Walmart—unlike *Sears*—“was not denied a forum when the Superior Court held that the NLRA preempted [its] lawsuit.” AB 9. Defendants cannot (or refuse to) grasp the difference between the “arguably prohibited” and “arguably protected” prongs of *Sears* preemption.

“[I]f *Sears* had filed a [ULP] against the Union, the Board’s concern would have been limited to the question whether the Union’s picketing had an objective proscribed by the Act.” 436 U.S. at 186. “[D]ecision of that issue would not necessarily have determined whether the picketing could continue,” because the NLRB could have concluded that the NLRA did not prohibit the trespassory picketing—because there was no coercive effect on the employees—without deciding whether the

NLRA *protected* the trespassory picketing. *Id.* at 198. In other words, a determination of “whether the Union had a federal right to remain on [Sears’] property” could only occur if the union filed a ULP charge *and* the NLRB issued a complaint, neither of which occurred. *Id.* at 202.

If Defendants had thought their conduct was protected under the NLRA, they could have filed a ULP and if the NLRB had investigated and issued a complaint based on disparate treatment or mining-camp-type inaccessibility, there would have been preemption. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-39 (1992) (union agents have right of access on employer’s property *only* in “rare” cases of (i) disparate treatment or (ii) where “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,” such as “logging camps, mining camps, and mountain resort hotels”). But none of that happened. OB 25-26.

On the flip side, *Walmart’s* filing of a ULP could have led to preemption only if it presented the same controversy to the trial court as it could have presented to the Board. But that is not the case: the ULP involved associate coercion, while this trespass suit involves Walmart’s property rights. *See Radcliffe*, 254 F.3d at 785; *supra* at 5-7, 9-10.

In fact, even if Walmart had not withdrawn its ULP charge, its state law trespass action could go forward. *Helmsley-Spear, Inc. v. Fishman*, 900 N.E.2d 934 (N.Y. 2008), is instructive. There, the court held that a state law nuisance claim based on union organizers banging on drums outside an employer’s facility was not preempted even though the

NLRB had dismissed the employer's ULP charge because their conduct did not violate the NLRA. As the court put it, "[t]he controversy in this case—whether the drumming constituted a private nuisance—is distinctly different from the matter presented ... to the NLRB, which involved allegations that the Union engaged in ... coercive conduct." *Id.* at 937.

Thus, Walmart did not "consent" to NLRB jurisdiction over its trespass claims. See *In re Ruff*, 168 Wn. App. 109, 275 P.3d 1175, 1179 (2012) ("parties cannot consent to subject matter jurisdiction"). And the snippet that Defendants pluck from the Arkansas trespass case (AB 3-4) reveals nothing more than this: Walmart chose to proceed in state court to stop the Defendants' trespasses, because the NLRB has no authority to grant such broader relief. As Walmart's counsel explained in that case, "Walmart filed charges against the UFCW several months ago related to the *coercive effect* of these in-store invasions." Defs.' App. 708:3-5; *infra* at 18-19 (cases noting NLRB's lack of jurisdiction to enjoin trespasses).

Defendants mistakenly rely (again) on a passage from *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), in which the court suggested there is preemption "when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court." *Id.* at 1517. The court went on to conclude that in such a "unique" case, "[b]y initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims." *Id.*

Again, unlike Walmart's trespass action, the employees in *Parker* brought state law interference-with-contract and fraud claims which presented the *same* legal controversy to the state court that the NLRB would have (*and did*) consider in determining whether the employer violated the NLRA. *Id.* at 1515-17 (state law fraud allegations "were nothing more than allegations that the Company failed to bargain in good faith ... in negotiating the concessions and in failing to reveal the likelihood of a plant closure").⁵ Because the claims before the two tribunals were identical, the risk in allowing the state court to go forward could "subject the employer to conflicting substantive rules." *Id.* at 1518.

No such risk exists here: whatever the NLRB might have decided as to whether Defendants' demonstrations coerced associates in their right to choose or reject a union, its ruling would not have impacted this trespass action. Even if Defendants were not guilty of coercing associates in violation of the NLRA, that does not mean they had a state law right to come onto Walmart's private property to conduct demonstrations.

Thus, *Parker's* statement about "restructuring" a failed NLRB charge as a state law claim cannot be expanded "so as to preclude any state law claims that have a common factual nexus with a previously filed NLRB charge." *Finan v. Field Holdings, Inc.*, 2000 WL 1785535, at *4-5 (N.D. Ill.) (distinguishing *Parker* because court could resolve plaintiff's

⁵ Moreover, *Parker* did not involve "deeply rooted" matters like the fundamental property rights at issue in this case. *Id.* at 1517.

IIED claim “without touching on the legal merits of his NLRB charge”); *see also Hill v. Peterson*, 35 P.3d 417, 421 (Ariz. App. 2001) (*Parker* irrelevant where plaintiff’s state law claims “could be adjudicated without deciding whether [defendant] committed an unfair labor practice”).

Similarly, *Volentine v. Bechtel, Inc.* (AB 7-8, 28-29) rejected any notion there is “automatic” preemption when a party files a ULP before suing in state court. 27 F. Supp.2d 728, 733-34 (E.D. Tex. 1998). Like *Parker*, there was preemption in *Volentine* because the legal controversy presented to the NLRB was the *same* as that presented in state court. *Id.* at 739 (“Plaintiffs’ state tort ... cannot be adjudicated without reference to the underlying labor issue—whether [the employers] were justified in ... firing the Plaintiffs (which, according to the NLRB, they were).”).⁶

For preemption purposes, Walmart’s state law trespass action is no different than that in *Sears*. The result in both cases should be the same.

3. Walmart did not seek to obtain, and could not have obtained, an NLRB injunction against simple trespass.

There is no ULP charge for trespass because the NLRA does not protect private property rights. The NLRA specifically limits the Board’s power to “prevent any person from engaging in any unfair labor practice.”

⁶ *T&H Bail Bonds Inc. v. Local 199*, 579 F. Supp.2d 578, 580-82 (D. Del. 2008), is also distinguishable. There, a business sued union picketers for interference with trade, *not trespass*. There was no indication that they trespassed; instead, the claim was that the union made misleading statements in their materials. Here, Walmart’s trespass suit seeks only to remove Defendants’ demonstrators from its private property.

29 U.S.C. § 160(a). Thus, the NLRA “must restrict itself to orders that effectuate the policies of the Act.” *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000) (quotations omitted). There is no general grant of jurisdiction to the NLRB to enforce a state’s police powers, such as protecting property rights. *May Dep’t Stores v. NLRB*, 326 U.S. 376, 390 (1945) (“The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent ... [a ULP] affecting commerce.”).

Defendants claim preemption in part because Walmart seeks an injunction that the NLRB could provide. According to the Defendants, Walmart’s ULP charge sought a nationwide injunction prohibiting Defendants “from holding any events inside Walmart stores or on adjacent parking lots.” AB 3. Neither of those statements is true.

Walmart did not file a ULP charge alleging that all the Defendants’ activities violated the NLRA. Rather, the ULP alleged that “the UFCW ... violated Section 8(b)(1)(A) ... by planning, orchestrating, and conducting a series of unauthorized and blatantly trespassory in-store mass demonstrations ... *by which the UFCW restrained and coerced employees in the exercise of their Section 7 rights.*” CP 243 (emphasis added).

Thus, if the NLRB sought (and a federal court entered) an injunction to stop Defendants’ coercion of associates in the workplace, the injunction would *not* stop their underlying trespasses, nor would it stop the disruptive flash mobs or parading and chanting directed at managers and

customers. Any injunctive relief would attempt only to limit the in-store intimidating and coercive conduct *directed at or affecting associates*.

As one court put it, “[s]ince trespass by a union organizer is not an [ULP] the NLRB is unable to grant any relief to a deserving employer. *May Dep’t Stores v. Teamsters Union Local No. 743*, 355 N.E.2d 7, 10-11 (Ill. App. 1976) (“If the employer is also denied access to the State courts his only recourse is to employ self-help.”). As Board cases confirm, *supra* at 6-7, the NLRB is not concerned with trespass. *See Radcliffe*, 254 F.3d at 786 (“the Board ordinarily leaves to the State the question whether non-employee union activity may be conducted on the employer’s property”).

Indeed, in response to the ULP charge that Walmart filed in Michigan, CP 1384-85, the Board issued a complaint that focused on only Defendants’ blocking associate access to the electronics department and following an associate into the women’s restroom to interrogate her about her wages, all in violation of NLRA 8(b)(1)(A). There was no mention of the trespassory activities that took place elsewhere in and around the store.

Defendants’ cases also support Walmart’s argument. In *District 65, RWDSU*, 157 NLRB 615 (1966), addressed at OB 33-34, the ALJ specifically distinguished the evaluation of the NLRA 8(b)(1)(A) employee-coercion allegation from any trespass action. *Id.* at 622 (regardless of whether union’s conduct “call[ed] for either police action or a remedy for trespass, or both, whether such action violates the provisions of Section 8(b)(1)(A) of the [NLRA], as amended, is not beyond doubt”). Ultimately, the ALJ ordered the union to cease and desist from

“preventing [the] employees from engaging in their normal work ... making threats, either veiled or direct ... and shoving or pushing.” *Id.* at 626. The order protected the employees; it did not bar any non-coercive trespassory conduct, and it did not protect the employer’s property rights.

For the same reason, *Detroit Typographical Union v. Detroit Newspaper Agency*, 283 F.3d 779 (6th Cir. 2002), and *Bartenders, Local 2*, 240 NLRB 757 (1979) (AB 23 n.10), are irrelevant. *Detroit Typographical* involved a consent order to stop unions from intimidating employees by “blocking or otherwise coercively interfering with ingress egress.” 283 F.3d at 783. In *Bartenders*, the cease and desist order arose out of “effort[s] to force [the employer] to sign the newly negotiated collective-bargaining agreement” in violation of NLRA 8(b)(1)(B). *Id.* at 761-62. The ALJ’s order prohibited the union from “seizing the premises of [the employer] ... and disrupting the business operations [of employer] all in the presence of [its] employees.” 240 NLRB at 762 (emphasis added). Neither decision addressed trespass.

That the NLRB occasionally considers property rights to determine whether a ULP was committed does not mean Walmart could have obtained relief from trespass before the NLRB. In *Roundy’s Inc. v. NLRB*, 674 F.3d 638 (7th Cir. 2012), AB 44, the employer ejected union organizers from a mall common area, and unlike here (where there is no “arguably protected” preemption), the union filed a ULP and the NLRB issued a complaint. *Id.* at 642-43. The NLRB also held that the employer violated *the NLRA* because it did not have a right to exclude from the

common area. That is far different than issuing an injunction to enforce the employer's state law property rights.⁷ There is no preemption here.

B. Trespass Is A Matter Deeply Rooted In Local Responsibility.

The trial court erred in its “subjective” finding that Walmart’s claims did not involve a deeply rooted local interest because there was no violence or intentional torts. First, given Walmart’s numerous and un rebutted declarations (and Defendants’ own videos of demonstrations,

⁷ The following cases (AB 44-46) follow a similar fact pattern as *Roundy’s*, and have no bearing on this appeal: *Walmart Foods*, 337 NLRB 289 (2001); *Wild Oats Market, Inc.*, 336 NLRB 179 (2001); *Farm Fresh, Inc.*, 326 NLRB 997 (1998) & *Farm Fresh, Inc. v. United Food & Comm. Workers Int’l Union*, 222 F.3d 1030 (D.C. Cir. 2003); *Harco Asphalt Paving, Inc.*, 353 NLRB 661 (2008); *In re Hacienda Hotel, Inc.*, 355 NLRB No. 170 (2010); *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006); *A&E Food Co. I, Inc.*, 339 NLRB 860 (2000); *O’Neil’s Markets, Inc.*, 318 NLRB 646 (1995) & *O’Neil’s Markets v. United Food & Comm. Workers Int’l Union*, 95 F.3d 733 (8th Cir. 1996); *Snyder’s of Hanover, Inc.*, 334 NLRB 183 (2001); *Weis Markets, Inc.*, 325 NLRB 871 (1998) & *Weis Markets, Inc. v. NLRB*, 265 F.3d 239 (4th Cir. 2001). As stated in *Acme Bus Corp.*, 357 NLRB No. 82 (2011) (AB 46): “Where a nonemployee trespasses onto an employer’s property, the Act is not violated when the employer directs him [sic] leave its private property and calls the police to enforce such an order.” *Id.* at *47 (emphasis added).

Other Board cases (AB 46) mention property rights when reviewing an *employee’s* NLRA rights. *Reliant Energy*, 357 NLRB No. 172 (2011); *Nova SE. Univ.*, 357 NLRB No. 74 (2011). In any event, Walmart seeks no relief against associates. Other cases are even further off point. *Embarq Corp.*, 358 NLRB No. 134 (2012) (surveillance of employees on public property); *Laborers’ Int’l Union of N. Am., Local 872*, 359 NLRB No. 117 (2013) (union member ejected from union hall for misconduct); *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (2014) (employer did not threaten employees when it told them not to speak to union organizer on site in violation of no trespass warning).

The remaining cases on AB 45 also address whether a property owner violated the NLRA by ejecting union agents, but these cases apply unique California laws that permit handbilling and the like in “shopping centers” under certain circumstances. Washington has no such laws, and in any event, none of the cases involved an injunction prohibiting trespass.

CP 411-12), Defendants stretch the truth (to say the least) when they say demonstrations were conducted “in an orderly and unobstructive manner.” AB 1-2. They blocked access in and around parking lots, sidewalks and store aisles, chanted loudly, banged on pots and pans inside a store, and were confrontational when managers asked them to leave.⁸ Time after time, law enforcement had to intervene.⁹

An incident of violence is not a question of if, but when. “Every act of trespass has the potentiality of violence if the trespass is a breach of the peace.” *Lawson Milk Co. v. Retailer Clerks Union*, 394 N.E.2d 312, 318 (Ohio App. 1977) (“acts of trespass arising out of a failure to leave after a proper request ... are all breaches of the peace”). Defendants have yelled at working cashiers for not joining a union. CP 826-27, ¶ 3. Another time, a crowd of demonstrators marched around a front entrance door and shoved handbills in front of customers squeezing by; demonstrators have even run up to customers as they were exiting their cars. CP 842-43, 1278. A demonstrator called a manager “a stupid bitch” when she told her she could not come inside the store. CP 844, ¶ 16.

On the law, Defendants are again wrong. They point to various decisions that held that violence, threats of violence, malicious libel, and intentional infliction of emotional distress are matters deeply rooted in

⁸ *E.g.*, CP 449, ¶¶ 2-4, 504, ¶ 3, 520, ¶ 11, 830, ¶ 5, 841, ¶¶ 7-9, 1090 (blocking); CP 512-13, ¶¶ 4, 7, 8, 518, ¶ 5, 1122, ¶ 2 (chanting); CP 510, ¶ 4, 1124, ¶ 3 (banging); CP 441, ¶ 8, 830, ¶ 6, 1118, ¶¶ 9-10 (confrontations with managers).

⁹ *E.g.*, CP 519-20, ¶¶ 8, 12; 843-44, ¶¶ 12-13, 15-16.

local interest. AB 30-34. True enough. But none of those cases say that trespass is omitted from the list. And on that point, the Supreme Court case law that Walmart cited (OB 27-28) confirms that non-violent trespass qualifies as an exception to *Garmon* preemption. See, e.g., *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983) (identifying *Sears*, in which the picketing was admittedly peaceful, as one of three then-most-recent “deeply rooted” decisions). In fact, the Court applied the “deeply rooted” exception in *Belknap* to a “breach of contract” claim that did not involve violence, threats of violence, or an intentional tort. *Id.* at 512.

Walmart also cited cases (OB 28-30) that cite *Sears* and recognize trespass as a matter deeply rooted in local interest.¹⁰ Defendants, however, dismiss them as “dictum.” AB 41-42. Wrong again. Courts in those cases identified various torts that the Supreme Court has said states retain jurisdiction to regulate—trespass among them—in order to determine if the particular torts before them also qualified as an exception to *Garmon* preemption. That is reasoning by analogy, not dicta.

Defendants’ own cases recognize (peaceful) trespass as a matter deeply rooted in local interest. *Penn. Nurses*, 90 F.3d at 803; *Hillhaven*, 41 Cal.App.4th at 855. The *Hillhaven* court noted that, “[i]n *Sears* . . . the [C]ourt expanded the local interest exception to a case involving *peaceful*, non-obstructive picketing on an employer’s private property,” and that

¹⁰ See also *Henry v. Laborers’ Local 1191*, 2014 WL 1775802, at *8 (Mich. 2014). “[T]respass by peaceful picketing” fits the local interest exception. *Platt v. Jack Cooper Transp.*, 959 F.2d 91, 95 (8th Cir. 1992).

since *Garmon*, the exception “has been extended to conduct ... which involves *neither violence or other threat* to the maintenance of domestic peace.” 41 Cal.App.4th at 854 (emphasis added & quotations omitted). Even the NLRB recognizes trespass as a matter deeply rooted in local interest. See, e.g., *Fed. Sec., Inc.*, 359 NLRB No. 1, at *12 (2012) (identifying trespass apart from “violence” or “threats of violence”).

Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (AB 30-32), is distinguishable. There is no indication that the peaceful picketing in that case occurred *on* the employer’s property. *Id.* at 132-33. In any event, *Youngdahl* predates *Lechmere, supra* at 13, which limits a union’s right of access to an employer’s property to situations of disparate treatment or mining/logging-camp inaccessibility, neither of which is alleged here.¹¹

Similarly, *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993) cited at AB 43, does not help Defendants because it is a disparate treatment case. Again, Defendants do not—and cannot—argue that Walmart allows other third party groups to demonstrate on its private property. There is no evidence of disparate treatment.¹²

¹¹ The following cases, all of which involved claims of “inaccessibility,” are also irrelevant because they were all decided pre-*Lechmere*. AB 43 n.17 (citing *Riesbeck Food Markets, Inc. v. UFCW, Local 23*, 404 S.E.2d 404 (W. Va. 1991), *Cross Country Inn, Inc. v. S. Cent. Dist. Council*, 552 N.E.2d 232 (Ohio Ct. App. 1989), *Shirley v. Retail Store Employees Union*, 592 P.2d 433 (Kan. 1979), and *Wiggins & Co. v. Retail Clerks Union Local No 1557*, 595 S.W.2d 802 (Tenn. 1980)).

¹² Similarly, *UCSF Stanford Health Care*, 335 NLRB 488 (2001), 325 F.3d 334 (D.C. Cir. 2003) (AB 45), is a “disparate treatment” case.

Finally, *Cranshaw Construction v. Local 7*, 891 F. Supp. 666 (D. Mass. 1995) (AB 43 n.17), involved a unique provision of the Labor Management Relations Act that allows an employer to sue a union for damages for violating the “secondary picketing” prohibitions. A federal court adjudicates the unique federal labor law in the first instance, and the *Cranshaw* court found a violation. It did not cite, discuss or apply *Sears*.

C. It Is Unnecessary To Remand This Case For Consideration Of Defendants’ Meritless Anti-SLAPP Motion.

Because the SLAPP motion raises only legal issues, this Court can decide the entire motion on this appeal. OB 35-36. Walmart owns or controls the retail property involved in this action; there is no evidence to the contrary. CP 568-825. Also, Defendants offer nothing to rebut Walmart’s evidence that its invitation to the public is limited to shopping. OB 38. They also admit they received Walmart’s cease and desist notices, CP 97, 100-02, which were crystal clear in notifying Defendants that they commit a trespass each and every time they come onto Walmart’s property for any reason other than to shop. Nor did Defendants’ motion dispute that store managers confronted them when they came on Walmart’s property, told them they could not demonstrate, asked them to leave, and called the police when they refused. OB 7-9, 44-45. Defendants even admit they are planning future trespassory demonstrations. CP 144.

Given that it cannot contest the dispositive trespass facts, Defendants try instead to minimize the impact of their disruptive trespassory demonstrations so as to distance itself from the “violent” or

“obstructive” conduct it concedes a court could enjoin. A peaceful trespass, however, is no less a trespass. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 681, 709 P.2d 782, 785 (1985) (individual liable for trespass if he intentionally entered another’s property, or he remained there, without permission or invitation).

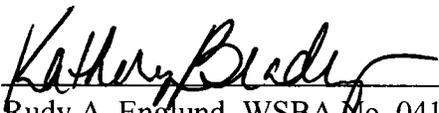
Defendants’ two declarations contain only conclusory statements that this action “will harm OUR Walmart’s ability to get out its message.” CP 238. But this suit is about conduct—*not speech*—and illegal conduct at that. Defendants are free to peacefully parade and chant and wave signs on public property all they want, so long as they do not block access.

III. CONCLUSION

This Court should vacate the dismissal order, instruct the trial court to deny the anti-SLAPP motion and remand for further proceedings.

RESPECTFULLY SUBMITTED this 11th day of July, 2014.

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